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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 422

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC.,
Respondent.

No. 423

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Petitioner,

vs.

FRIEDMAN-HARRY MARKS CLOTHING COMPANY, INC.,
Respondent.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

(Cases Nos. 422 and 423 are consolidated for the purposes of argument and brief.)

Statement

These cases arise under Petitions of the National Labor Relations Board for writs of certiorari filed in this Court September 30, 1936. They followed the denial by a unani-

mous Court of petitions of said Board filed in the Circuit Court of Appeals for the Second Circuit under the provisions of Section 10 (e) of the National Labor Relations Act, against the Respondent, Friedman-Harry Marks Clothing Co., Inc., for the enforcement of the Board's Decisions and Orders of March 28, 1936, in which Respondent was found guilty of violating Section 8, subdivisions (1), (3) and (4) of the National Labor Relations Act, (Public 198—74th Congress), approved July 15, 1935.

Opinion Below

The per curiam opinion of the Circuit Court of Appeals for the Second Circuit is reported in 83 Fed. Rep. (2nd) 731, and appears in the Record at page 575.

The Parties:

The National Labor Relations Board was appointed by the President of the United States on August 24, 1935, pursuant to the provisions of Section 3 (a) of the National Labor Relations Act (Public 198—74th Congress), approved July 15, 1935.

The Friedman-Harry Marks Clothing Co., Inc., is a Virginia corporation, organized, existing and transacting its business of manufacturing men's clothing under the laws of the State of Virginia, with its one factory and place of business in the city of Richmond, Virginia.

Nature of the Cases:

These cases, both of which present the same factual and legal questions, arose as the result of the filing of charges by the Amalgamated Clothing Workers of America, a Labor Union of workers in the men's clothing industry, with the Petitioner, National Labor Relations Board, in which it

was alleged that the Respondent, Friedman-Harry Marks Clothing Co., Inc., had violated the National Labor Relations Act by discharging from its employ, and discriminating against, twenty-nine out of its eight hundred manufacturing employees, because they had engaged in union activities (R. 11, 424).

As a result of the filing of these charges, the National Labor Relations Board issued two Complaints against this Respondent, one on October 26, 1935, and the other on November 15, 1935. These Complaints charged that Respondent is a Virginia corporation, "engaged at a place of business in the City of Richmond, State of Virginia • • • in the production, sale and distribution of men's clothing" (R. 16).

The Board also charged that the raw materials from which this men's clothing is manufactured are "transported in interstate commerce" to the plant of Respondent in Richmond, Virginia, and that after the raw materials are there converted and fabricated into men's clothing by Respondent, a large proportion of the finished product is "sold and transported in interstate commerce" to purchasers beyond the borders of the State of Virginia; all of which, the Board charged, constitutes "a continuous flow of commerce among the several States" (R. 16).

Proceedings of the National Labor Relations Board:

The Board filed its Complaints against Respondent on October 26 and November 15, 1935.

Respondent thereupon filed Special Appearances and Motions to Dismiss the Complaints, on the ground that the National Labor Relations Act is unconstitutional and in-

valid, and that the attempt to enforce said Act against this Respondent is illegal (R. 25-32). These objections and Motions, which were renewed at the opening of the hearings, were overruled by the Trial Examiner, to which action Respondent noted an exception.

Appearing specially, and expressly reserving its constitutional rights, Respondent also filed Answers to the Complaints, denying all of their allegations except that Respondent is a Virginia corporation engaged in the business of manufacturing men's clothing in Richmond.

In order to present these cases squarely to the Board and to the Courts on the question of the constitutionality of the Act, to expedite the Board's decision and to save time and expense, counsel for Respondent announced at the commencement of the hearings that he would not cross-examine any of the Board's witnesses and would not offer any countervailing evidence. Respondent also made available to the Board all the data and records respecting Respondent's business which the Board had demanded (R. 35).

Objections were made by counsel for Respondent to the admissibility and relevancy of a number of affidavits of so-called "experts" relating to trade unions and the men's clothing industry in general which were offered by Petitioner. This testimony was made up in large part of hearsay, opinions and arguments, concerned conditions in other clothing factories in other States and did not pretend to and in no wise concerned the operation and conduct of Respondent's business. The Trial Examiner and the Board admitted all of this testimony, to which action exceptions were noted (R. 96; 97; 100; 101; 175; 176; 330; 332; 334-5; 361; 366; 368-9; 448-9; 450-1; 452-3; 454; 457-8; 464-5; 478-9; 485; 492; 497; 498; 502; 507; 511; 522; 525).

Following the conclusion of the hearings on December 5, 1935, counsel for Respondent made repeated requests for a prompt decision from the Board. Despite these requests, the National Labor Relations Board did not hand down its decision in these cases until March 28, 1936, almost four months later, at which time it found Respondent guilty as charged, with respect to nineteen of these employes (R. 375; 527). Simultaneously with the rendition of the decisions, on March 28, 1936, the Board forwarded Petitions for the enforcement of its decisions to the United States Circuit Court of Appeals for the Second Circuit.

The United States Circuit Court of Appeals for the Second Circuit denied the petitions (R. 575).

The Facts of these Cases:

(a) as to Respondent's business (R. 75-96):

Respondent has been engaged in the business of manufacturing men's clothing in the City of Richmond, State of Virginia, since 1931, succeeding a similar business conducted for many years in the same place by most of the present stockholders of the Company. It owns and operates one manufacturing plant, employing approximately eight hundred people, all residents of the State of Virginia, and its offices are located in this plant.

The materials which Respondent uses in its business come from various parts of the United States. It designs, cuts, converts and fabricates raw materials, through approximately one hundred different operations, into men's clothing, the entire process of manufacture taking place within its factory in Richmond, Virginia. This clothing Respondent sells to retailers, 17.2% of the product being sold to retailers in the State of Virginia, and the balance in various States of the United States.

All orders for merchandise are received and accepted at Richmond, and all merchandise is sold f.o.b. Richmond, Virginia, and shipped pursuant to customers' orders.

The men's clothing manufactured by Respondent constitutes less than 1% of the men's clothing manufactured in the United States.

The alleged unfair labor practices complained of in this case, are shown by the evidence to have occurred during the course of the manufacture of Respondent's product in Richmond (R. 75-96; 328-374; 453-525).

(b) as to the alleged unfair labor practices:

In 1935, the Amalgamated Clothing Workers of America were attempting to organize the workers in Respondent's factory.

Petitioner contends that the evidence in this Record shows that Respondent violated the Act by (1) interfering with the attempted organization of its employes, (2) discriminating against nineteen employes because of their membership in a labor union, (3) discharging an employe because she filed charges, under the Act, against it.

At no time, either prior or subsequent to the filing of these complaints, has there been any disorder or industrial strife or any strike at or in connection with Respondent's factory, and at no time has there been any interference with or stoppage of the production or shipment of its merchandise.

There is absolutely no evidence in this Record that the alleged unfair labor practices in these cases in any way affected the manufacture, sale or distribution of the pro-

ducts of Respondent, or affected, burdened or obstructed the flow of these products into interstate commerce, or in any way affected, burdened or obstructed the flow of interstate commerce, or even tended to do so.

Decisions and Orders of National Labor Relations Board (R. 375; 527):

The Board found that Respondent was engaged in unfair labor practices affecting commerce within the meaning of Section 2, subdivisions (6) and (7), and Section 8, subdivisions (1), (3) and (4) of the National Labor Relations Act.

The Board thereupon ordered Respondent to cease and desist and to offer the discharged employes full reinstatement with back pay (R. 375; 527).

ARGUMENT

I.

THE ACT, BY REASON OF ITS CHARACTER AND SCOPE, IS UNCONSTITUTIONAL.

(THE REAL PURPOSE OF THIS ACT IS A SOCIAL AND ECONOMIC ONE, ACCOMPLISHED IN AN ARBITRARY, CAPRICIOUS AND DISCRIMINATORY MANNER THROUGH UNIONIZATION OF ALL INDUSTRY AND BUSINESS BY FIAT.

The necessity for and propriety of first ascertaining the real purposes of the Act.

In order to comprehensively test the validity and constitutionality of Congressional legislation of the character of the National Labor Relations Act, it is both necessary and proper to first consider the ultimate object of the legislation as well as the means by which it is sought to be accomplished.

It is necessary to examine such objectives to ascertain whether there is constitutional sanction for the power which Congress seeks to exercise, or whether it is attempting, under the guise of the exercise of a constitutional power, to wield the influence of the Federal Government over matters beyond the jurisdiction delegated to it.

And such an examination is proper because Congress has no right, no authority and no power to adopt legislation, however meritorious or beneficial, affecting a subject matter which is actually beyond the jurisdiction of the Federal Government, merely because Congress declares in the Act, itself, that its aim is to regulate some matter over which it does have constitutional power.

The validity of legislation depends upon the real substance of the subject matter it comprehends, rather than its form as expressed in a declaration of "Findings and Policy".

The Supreme Court of the United States has several times recently reaffirmed this established principle.

Railroad Retirement Board et al. v. *The Alton R. R. Co. et al.*, 295 U. S. 330, at pp. 363, 371, 374.

United States v. *Butler*, 297 U. S. 1.

United States v. *Constantine*, 296 U. S. 287 at p. 296.

St. Joseph Stock Yards Co. v. *United States et al.*, 298 U. S. 38 at pp. 51-52.

Carter et al. v. *Carter Coal Co. et al.*, 298 U. S. 238, at pp. 289-291.

(a) The real purposes of the National Labor Relations Act.

This Act was intended to assist union labor in its efforts to unionize all industry and business through the establishment of a national scheme of compulsory unilateral collective bargaining.

This and this alone was the purpose of the Act. All avowals and professions now urged in legal support of it are only attempts to justify and validate this objective. And this purpose is effectuated by imposing arbitrary and unreasonable restrictions upon all employers, rendering them impotent in their relations and dealings with their employes, and forcing nonunion employes into labor unions in order that they may secure or retain employment.

Regardless altogether of the merits or wisdom of such a purpose and plan, its constitutionality must be judged by whether or not it falls within the Federal legislative power and whether or not it bears a real and substantial relationship to the exercise of that power.

A reading of the Act, itself, immediately discloses that the purpose of Congress was not to regulate interstate commerce or business or workers engaged in interstate commerce. It is the plain intent of this statute that its terms and provisions are to be applied to—and the National Labor Relations Board and the Government are applying them to—all businesses, whether engaged in interstate commerce or not. Without laboring the point, this can be readily seen by a mere examination of the names of the concerns against whom complaints have been prosecuted and the types of businesses they conduct.

The references to interstate commerce, contained in the Act, were placed there only for the purpose

and with the hope that their mere inclusion would lend constitutional color and bona fides to the social and economic ends sought to be attained by Congress, and as a prop to uphold the validity of a Federal statute, which can be sustained upon no other grounds.

(b) The background of the Act.

The history and background of this legislation disclose the real motive for and intent of this act. It was proposed solely as a substitute for Section 7 (a) of the National Industrial Recovery Act. That statute was declared to be invalid in the case of *Schechter Corp.* v. *United States,* 295 U. S. 495, in which the Supreme Court said that for social and economic purposes Congress cannot regulate industry and business, or employer and employe relationships therein, merely because they could be said to indirectly affect the flow of interstate commerce.

No argument and no theory can be raised in support of the National Labor Relations Act which was not urged upon the Supreme Court by the Government in the Schechter case.

This Act, exactly as Section 7 (a) of the NIRA, had its inception, not in the needs of interstate commerce, but in the demands of labor unions. It is a matter of common knowledge that for years union labor had been proposing such legislation to Congress. And this Act was conceived in the desire of labor to secure the force of Government behind its efforts to unionize all private industry and was born of the endeavor by Congress to satisfy those demands.

As a matter of fact, prior to the decision in the *Schechter case,* the present Act was pending before Congress. At that time there was no doubt or question as to the purposes and objectives of Congress as expressed in this legislation.

According to the committee reports, they were:

> "The first objective of the Bill is to promote industrial peace."
>
> (Senate Rept. No. 573 74th Cong., 1st Sess., May 1, 1935; at p. 1).

> "The second major objective of the Bill is to encourage, by developing the procedure of collective bargaining, that equality of bargaining power which is a prerequisite to equality of opportunity and freedom of contract."
>
> (Supra, p. 3).

Even after this Court had spoken in unmistakable terms in the *Schechter* decision, when amendments were proposed in Congress affecting the form but not the substance of the Bill, the House Committee on Labor reported, with respect to the objectives of the legislation and the amendments—

> "The Committee amendment to this Section reformulates the declaration of policy in order to emphasize the intent of the Bill to promote industrial peace, and therefore to bring it more clearly outside of the ruling in the Schechter case."
>
> (House Rept. No. 1147; 74th Cong., 1st Sess., June 10, 1935; p. 9).

(c) The illusory "Findings and Policy" of Section 1 of the Act attempt to conceal the real objectives of the Act in a vain effort to justify their illegality.

In order to circumvent the decision of the Supreme Court in the *Schechter* case, a prefatory statement of purported findings and a declaration of governmental policy were included in this Act in an attempt to cure the notorious and

inherent defects which will always exist in legislation such as this, short of a Constitutional Amendment.

This prefatory veil of "Findings and Policy" was thereby constructed, behind which it was hoped to perform the magical trick of turning strictly social and economic legislation into the regulation of interstate commerce. But the veil is so transparent and the trick so obvious that the hands of the prestidigitators are not as quick as the public eye, much less the scrutiny of the Court, in disclosing the stratagem.

Once this veil (of eliminating the causes of certain substantial obstructions to the free flow of commerce) is removed, and even conceding that the Act was not designed solely to further the interests of national labor unions, the very best that can be said for it is that it is a federal scheme to maintain just relations between all employers and their employes and thereby to promote the general public interests.

In drafting the Bituminous Coal Conservation Act of 1935, popularly known as the Guffey Act, the same strategy was adopted. A "Preamble" of purported findings and policy of Congress prefaced the Act. This Court, in determining the validity of the statute, said that, according to the preamble, it was designed, through the removal of alleged obstructions to the free flow of commerce, "to protect the general public interest and health and comfort of the people" and to "maintain just relations between producers and employes and others."

With respect to these aims, this Court, in the case of *Carter* v. *Carter Coal Co. et al.*, supra, said (pp. 290-291):

> "These affirmations—and the further ones that the production and distribution of such coal 'directly af-

fect interstate commerce', because of which and of the waste of national coal resources and other circumstances, the regulation is necessary for the protection of such commerce—do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the *opinion* of that body existed and justified the expression of its will in the present act. Nevertheless, this preamble may not be disregarded. On the contrary, it is important, because it makes clear, except for the pure assumption that the conditions described 'directly' affect interstate commerce, that the powers which Congress undertook to exercise are not specific but of the most general character—namely, to protect the general public interest and health and comfort of the people, to conserve privately-owned coal, maintain just relations between producers and employees and others, and promote the general welfare, by controlling nation-wide production and distribution of coal. These, it may be conceded, are objects of great worth; but are they ends, the attainment of which has been committed by the Constitution to the federal government? This is a vital question; for nothing is more certain than that beneficient aims, however great or well directed, can never serve in lieu of constitutional power.

* * * * * *

"The proposition, often advanced and as often discredited, that the power of the federal government inherently extends to purposes affecting the nation as a whole with which the states severally cannot deal or cannot adequately deal, and the related notion that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court."

(d) The avowed objectives of the Act, as expressed in its Title, are belied by the terms of the Act itself.

The Title of this Act states that it is "an Act to diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce". The Findings and the Policy

contained in Section 1 declare that it is the underlying theory of Congress that the denial by employers of the right of employes to organize, and the refusal by employers to collectively bargain, lead to strikes, which have "the intent or necessary effect of burdening or obstructing commerce", and that it is for the purpose of *eliminating strikes* and *other industrial strife* that the Act is passed.

Yet, by Section 13 of the Act, it is provided: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

Not only, therefore, is the Title a misnomer, but the statement of the basic and underlying philosophy, and the constitutional justification for it, contained in the Title, are directly belied and nullified by Section 13. This section, instead of discouraging or outlawing strikes, preserves and maintains them in all their strength and vigor as a weapon in the hands of unions to enforce their demands against employers.

It is obvious and inescapable, then, that instead of attempting to diminish industrial strife and to regulate interstate commerce, the statute is designed purely, as stated in Section 1, to promote the interests of union labor, to enhance its bargaining power, to stabilize competitive wage rates and working conditions within and between industries and to prevent business depressions—all matters relating only to public welfare.

(c) The provisions of the Act adroitly attempt to broaden and enlarge its sphere to include all employes and all businesses.

The Title of the Act refers to "interstate and foreign commerce". Section 1, containing the findings and policy of Congress, refers to "commerce", which is defined, in

subsection 6 of Section 2 of the Act, to mean commerce among the States.

The provisions of the Act, however, reach out and attempt to broaden its influence so as to apply to *all* workers engaged in *all* industry, and to *all* businesses.

The term "employer" is defined in Section 2 of the Act so as to include anyone employing any labor, with the exception of the United States Government, a State or political subdivision thereof, or any person subject to the Railway Labor Act, *or any labor organization or its representative.* This definition, therefore, includes every employer except those specifically exempted, whether engaged in interstate commerce or not. It applies to the corner groceryman, the proprietor of a "hot dog" stand, the lawyer, the doctor, the butcher and the candlestick-maker.

The term "employe" is defined in Section 2 so as to include every person working for another, except those employed as agricultural laborers or in domestic service or by a parent or spouse. The Act, therefore, applies to the clerk in the confectionery store, the cook behind the "hot dog" stand, the stenographer in the law office, the doctor's nurse, the butcher's errand boy and the helper who pours the wax into the candlestick-maker's mould.

(It is certainly interesting to note, in passing, that the only three classes of employes exempted from the provisions of this Act are those in whose ranks union labor has been utterly unable to make any headway.)

By Sections 9 and 10, the Board is given jurisdiction over *any* person who engages in *any* unfair labor practice which may be said to "affect" commerce. The term "affect-

ing commerce" is defined in Section 2 to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

With this sweeping definition of "affecting commerce", and with substantially all employers and employes being subject to the terms of the Act, what conceivable alleged labor dispute could there be which could not be construed to fall within the judicial purview of the National Labor Relations Board?

Far then from regulating labor disputes arising only in interstate commerce, as stated in the Title and Findings and Policy of the Act, the language and terms of the Act clearly show that it was intended and contemplated that it should apply directly to every employer, every employe and every labor relationship.

And the proof of this intention and that it is being carried out, even though disclaimed and denied by the Government in its Brief in this case, are found in the construction placed upon the Act by the National Labor Relations Board that any labor dispute in any business which imports some of its materials from without the State and sells some of its product to purchasers beyond the State occurs in the "stream of commerce", and, therefore, may affect interstate commerce.

Under this interpretation, the Act necessarily applies to every business, and to retailers even more so than to manufacturers, because the retailer receives his merchandise from without the State and sells it to purchasers beyond the borders of the State without in any wise

changing its character or taking it out of the "stream". In no reported case, *even since the decision in the Carter case,* has this Board held that the labor dispute in question did not "affect" commerce, or that the employer, regardless of the business in which he was engaged, and his employes, regardless of the nature of the work they performed, were not subject to the terms of the Act. (*Commerce Clearing House Labor Law Service,* Par. 15401-15602.)

(f) The Act is arbitrary and capricious.

The most significant feature of this entirely arbitrary and capricious Act is its utter failure to regulate in any way the practices or conduct of labor unions or to make them responsible, in any degree, for their acts or for the acts of their representatives. It is almost inconceivable that any governmental authority, if its purpose is to eliminate strife between any two classes of persons, should attempt to effectuate that end by wholly and completely restricting the activities of one class and leaving the other class absolutely unfettered, untrammeled and free to use whatever methods it sees fit in order to gain its ends.

All employers are completely hamstrung and rendered impotent and subservient to the domination of labor organizations by Sections 7, 8 and 9 of the Act. This Act goes further in assisting unionization and disarming employers than any previous legislation ever enacted in any country operating under a republican form of government.

If strikes and industrial strife create burdens and obstructions to interstate commerce, and it is really the intent of Congress that this Act shall eliminate them, then the only way to achieve that end is to place mutual obligations on both employer and employe.

This the Act does not do. It prohibits and effectively prevents the employer from in any way interfering with the complete organization of his plant by the union, and it requires him to recognize and bargain with that union as the representative of his employes with respect to every relationship between them.

On the other hand, it imposes absolutely no responsibility or obligation on the employes or on the union, permitting them, without bargaining as to wages or hours or conditions of employment at all, to create dissatisfaction and dissension, to destroy loyalty to the employer and that esprit de corps and morale so necessary to the successful conduct of any business or enterprise.

The Act leaves them free, without having made any demands whatsoever, and merely for the purpose of organization and forcing unionization, to call and carry on strikes, to "sit down" and illegally occupy and take over the employer's premises and property, to boycott his products, and even to carry on against him a "sympathetic strike" in aid of a union or a strike in some other place and in some entirely unrelated plant or industry.

And all of this may be done irrespective of whether or not the employer is entirely fair and innocent of any overt act and irrespective of whether there has ever been any controversy between the employer and his employes. Moreover, these measures may be exercised by the employes or the union while any complaint is pending before the National Labor Relations Board.

But this Act does not even stop there. It requires the employer to bargain to a conclusion, meeting the proposition of his employes or their union with one counter propo-

sition after another, the fairness of each of which the Board is authorized to determine. At the same time, however, it leaves the union free to refrain from bargaining, to adhere to its original demands, however unreasonable they may be, and free to discontinue bargaining at any time.

Finally, if an agreement is reached, while the employer is held strictly accountable for the carrying out of all its terms, the union or any employe may disavow the agreement with impunity at any time and neither can be compelled to work under its terms or be penalized by the Act.

Above all, however, it subjects the employer to the continuous threat of complaint and prosecution in every one of his relations with every one of his employes. Every time he hires, discharges, promotes, demotes or in anywise changes the status of any employe, or adopts some regulation for the conduct of his business, he must be prepared to justify and defend his position, and prove his innocence of an "unfair labor practice". Indeed, the Act veritably turns the various Circuit Courts of Appeals into police or magistrates' courts.

What reason could there be for the failure of Congress to place any limitation, restriction or obligation on labor, except that it submitted to the policy and the determination of labor to secure privilege and power under governmental sanction without itself accepting any obligations or responsibilities?

The National Labor Relations Act perpetuates this policy. Very astutely it gives to national labor unions, as such, every benefit which can flow from the Act, without at the same time placing one iota of responsibility upon them

for anything which they or their representatives may do. This is arbitrary and capricious legislation of the most glaring type and of the worst character. Above all, however, it illustrates that the Act was not designed to and does not bear any substantial relation to interstate commerce.

(g) The Act arbitrarily discriminates against non-union workers.

Not only are labor unions free from responsibility and regulation, under the terms of this Act, but workers who are not members of labor unions, and not desirous of joining labor unions, are deliberately discriminated against and placed at the mercy of the unions. The terms of the statute practically require every worker to join a labor union, or be bound by its agreements with his employer, or forfeit his job.

There is no person to whom and no place to which a worker may look for assistance if he objects to becoming a member of a union or objects to it making contracts for him. He cannot turn to his employer, because the employer is directly forbidden by Section 8 of the Act to take any steps whatsoever to help him. He can not turn to the Labor Relations Board, because the Act does not give it jurisdiction over any complaints against labor unions.

The non-union employe may be bludgeoned into joining a labor union. Subsection 3 of Section 8 of the Act makes it possible for the union and an employer to agree that the employer shall require, as a condition of the continuation of employment of his workers, or as a condition precedent to the employment of workers, that those workers must be members of the labor union. *So that, while Section 8 of the Act specifically prohibits an employer from discharging*

any employe because he is a member of a labor union, the same section gives him the right to discharge his employe if he refuses to become a member of a labor union.

Thus the Act fosters and gives statutory sanction to the "closed shop", traditionally the fundamental objective and prime demand of every union. Not only that, but this section of the Act places the bewildered and helpless employer at the mercy of rival unions, each of which may be demanding, on its own behalf, a closed shop, one being in the ascendancy one day and the other the next.

Section 9 of the Act provides that when a majority of employes are members of a labor organization, the employer must bargain collectively with it, and the terms of that bargain shall be binding upon non-union workers. The only recourse open to non-union workers is that found in subsection (a) of Section 9, that they "shall have the right at any time to present grievances to their employer". What a mockery this is!

(h) The Act discriminates in favor of a selected type of labor organization and arbitrarily outlaws all others.

If, as is claimed, collective bargaining by employes with their employers is a necessity in order to eliminate industrial strife, it certainly does not follow that collective bargaining when carried on by a national labor union is always salutary, but when carried on by a plant organization welcomed or countenanced by its employer, or by a workers' organization even encouraged by the employer, is always vicious. Yet, this is what the National Labor Relations Act holds, because it outlaws the latter labor organizations.

Sub-division 2 of Section 8 of the Act refers to *"any"* organization of workers, and makes it unlawful for an employer to contribute financial *"or other support"* to it.

Then, by sub-division 3 of Section 8, the employer is prohibited from contracting with such an organization of his workers. All company unions and local organizations of workers are thereby arbitrarily outlawed. This intolerant, bigoted and prejudiced attitude exemplified not only in the Act but by the decisions of the Board, is emphasized by the provisions contained in sub-division 2 of Section 8 and sub-division (a) of Section 9, which provide that the employer may *"confer"* with his individual employes and that they may "present grievances" to him, *"subject to rules and regulations made and published by the Board"*. In other words, the employer may talk to his employes about their work and they, on their part, may talk to him about it only at the times and under the conditions prescribed by the National Labor Relations Board.

Thus, this Act, which has for its ostensible purpose the promotion of industrial peace and good will between employer and employes, actually erects a barrier between their free intercourse and relations, attributes improper motives both to all employers and their workers not having union agreements, prevents even the possibility of mutual understanding of mutual problems, and forces them to deal with each other at arms' length.

The Act virtually holds, and the logic applied by the Board in its decisions is, that an organization of workers other than a national labor union in which an employer shows any interest or to which he lends even any moral support is, *ipso facto,* disqualified from representing its members in collective bargaining with the employer. And it holds that the employer is guilty of violating the Act, if, forsooth, he attends any of its social functions or meetings, indicates his approbation of their forming such an organization and his willingness to bargain with it, contributes ice

cream to its picnics or lemonade to its dances or follows any of the dictates of good business policy.

Certainly, it need not be argued that it is a fundamental principle of successful business management that the efficiency of employes is enhanced and labor turnover is decreased in ratio to the extent that an employer is able to inspire and hold the goodwill, loyalty, confidence and cooperation of his employes by his friendly association with and sympathetic attitude toward them and their interests. Every well managed business, which can afford it, maintains a personnel department for the very purpose not only of instructing its employes in their duties, but of aiding and assisting them individually and their "mutual benefit" and "employes aid" associations as well. Is it only by encouraging the affiliation of his workers with a national labor union that an employer can succeed in removing all suspicion of his motives in his dealings with his employes?

It must be obvious that no considerations of general public welfare or industrial peace, much less the regulation of interstate commerce, dictated this arbitrary legal distinction between company unions and national labor unions, but that the outlawing of company unions was inserted in this Act solely at the behest of the national labor unions, which sought by statutory enactment to destroy all organizations of workers in industry which it did not or could not control.

(i) The administrative procedure outlined in the Act, and the procedure adopted by the Board in its administration of the Act, demonstrate its discriminatory, arbitrary, unreasonable and unlawful character.

From the very moment that the administrative wheels of this mill begin to turn, up to and including the time that

the decision of the National Labor Relations Board comes out of the hopper, every revolution discloses some unreasonable and unlawful invasion and abuse of fundamental rights. *The procedure in this case is merely illustrative.*

We call the Court's attention, at this point, to the fact that at the very beginning of this case counsel for the Company notified the National Labor Relations Board and its attorneys that, in order to expedite the determination of the matter of the constitutionality of this Act and the validity of its application to this company, while objections would be made and reserved to all incompetent, irrelevant and immaterial testimony, no witnesses for the Complainants would be cross-examined and no countervailing evidence on behalf of the company would be offered, and that all *relevant* and *material* matter in the possession of the company would be presented to the Board upon its request.

Let us ascertain how this impartial Board proceeded to hear and try these cases.

For several months preceding the early Fall of 1935, the usual slack season in the plant of the Friedman-Harry Marks Clothing Company, the Amalgamated Clothing Workers of America, a national union of workers in the clothing industry, had been attempting to organize the eight hundred workers in that plant. During the months of August and September of that slack season, the company furloughed and laid off a number of these eight hundred workers. Included among them were ten of the twenty odd manufacturing workers whom the union had succeeded in securing as members. Thereupon, the Union, on behalf of these workers, laid the charge with the National Labor Relations Board that the Respondent had been guilty of unfair labor practices.

There was no strike, no disturbance of any kind, no picketing and not the slightest interruption to production in the company's plant or to its business. Despite this, and despite the fact that the Complainants themselves show that this company operates only one plant, situated in Richmond, Virginia, where it produces, sells and distributes its product, the Board, in order to attempt to assert its jurisdiction over this Respondent, charged that the alleged unfair labor practices "occurred in commerce among the several States" and did "burden and obstruct such commerce and the free flow thereof".

Following its usual procedure, the Board thereupon issued releases to the Press of the country, publishing the alleged guilt of this company, and then demanded access to and a disclosure of all of the company's private records of accounts including the disclosure of the amount of capital invested in it by its various private owners, the names of all of its employes and its payrolls, the amounts and character of all its purchases and from whom made, the amounts of its sales and to whom made, including the number and kind of units, the number of employes in the plant during the years 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, the names and addresses of the directors and officers of the company, the names and addresses of its salesmen, the stock ownership of the company, the affiliation, if any, with other companies, and the former occupations and businesses of its stockholders.

What possible relevancy could the names of this company's customers, the amounts of the purchases, the cost of the various raw materials going into the manufacture of its products and from whom they were purchased, the volume of the company's business, the amount of its invested capital, the names and addresses of its salesmen, have to

either the legal question of whether or not the company was engaged in interstate commerce, or the factual question of whether the company was guilty of the unfair labor practices charged against it? It should be remembered that these hearings were open to and attended by the public and the press.

Having made the Complaint and having publicized it, and having made the "investigation" referred to above, this Board then appointed an *engineer* to act as its Trial Examiner not only to hear the case, but to determine all the legal questions involved, and particularly the applicability of this statute to this controversy.

This Record, containing some five hundred pages of testimony offered by counsel to the Board, who acted as prosecuting officer, shows that although numerous, continuous and strenuous objections were urged to a very large proportion of the testimony, because it was composed of rank hearsay, rumor, unqualified opinion and totally irrelevant, immaterial and unrelated matters of no probative force, the Trial Examiner and the Board, nevertheless, admitted and considered such testimony as the following:

> The testimony of H. K. Herwitz (R. 102-177), a former statistician and Vice-President of the bank of the Amalgamated Clothing Workers of America and a former member of the Men's Clothing Authority under the NRA, as to the development of the manufacture of clothing into a national industry, his opinions as to the interstate character of the production of men's clothing, the distribution of clothing establishments and manufactured clothing among the various States, the percentage of garments cut in the various States in 1934, the percentage of man hours worked in various States in the clothing industry in January, 1935, the

sources of the raw materials entering into the manufacture of men's clothing, the percentage of woolen and worsted goods manufactured in the New England States in 1929, the percentage of woolen, cotton, rayon and all other fabrics and materials used in the manufacture of men's clothing, and their sources, the distribution by wholesale of men's clothing for the year 1929, the distribution by retail of men's clothing for the year 1929, the number of men's and boys' clothing and furnishing stores by States and amounts of sales, the methods of advertising and selling the products of clothing manufacturers, the growth of retail chain stores in the clothing business, his opinion of the affect of the manufacture of men's clothing on the flow of commerce, the method and cost of transportation of men's clothing manufactured, his opinion of the kind of competition existing in the men's clothing business, the amount of unemployment in various clothing manufacturing centers, and his opinion with respect to the wage rates there paid.

The testimony of Julius H. Levy (R. 178-184) a competitor of the Respondent, as to his experience as a clothing manufacturer and President of the New York Clothing Manufacturers Exchange, including such opinions as that "there can be no doubt in my mind but that the men's clothing industry is an interstate as contrasted to an intrastate business"; a dissertation upon the history of the clothing business and the methods employed in the manufacture of men's clothing.

The testimony of Sidney Hillman (R. 185-257), President of the Amalgamated Clothing Workers of America, and former member of the National Labor Advisory Board and National Industrial Recovery Board, as to his familiarity with collective bargaining in industry, his opinion as to its value, a letter from

President Franklin D. Roosevelt to Mr. Hillman on June 17, 1935, congratulating and complimenting him for his work as a member of the National Industrial Recovery Board, a description of the men's clothing industry in America, a history of the Amalgamated Clothing Workers of America, its aims and procedure, his opinion that the Respondent is engaged in interstate commerce and his reason therefor, a description of the alleged unfair labor practices of various other clothing manufacturers in the United States, his quotation from a report of Alexander Hamilton to Congress in 1791, his opinions as to the reasons why one clothing manufacturer is able to undersell another, his opinion as to why many large clothing manufacturers had removed their factories from highly populated cities to smaller communities, his opinion as to the devastating effect of the economic depression of 1929, his opinion as to the benefits and advantages of the National Industrial Recovery Act and the Codes of Fair Competition, a compilation of the average hourly rate paid to manufacturing employees as prepared by the Management Members of the Code Authority for the Men's Clothing Industry, his summary of the testimony of various witnesses before Senate Committees and of articles and reports appearing in labor magazines and Government and State publications, the successful effect of the efforts of the Amalgamated Clothing Workers of America on the clothing industry, an editorial from the official organ of the Union with respect to the policy of the Union, quotations from trade union agreements and the opinions of various Boards and Commissions of those agreements, excerpts from the opinions of economists and sociologists as to the beneficent value of Amalgamated Union, his opinion as to the reasons for and lists of strikes and his comments upon various strikes occurring in the United States during the years 1933 and 1935, a list of clothing

manufacturers who maintain offices in the State of New York, a list of clothing manufacturers who maintain retail stores in the United States and the places where they are located, a table of the amount of national magazine and newspaper advertising, and the cost of it, of clothing manufacturers during the years 1929 and 1933, excerpts of testimony taken before labor commissions and others in the course of various labor investigations, and a table of the strikes and lockouts occurring in the men's clothing industry in 1933 and 1934.

The testimony of Dr. Henry Moskowitz (R. 257-281), Impartial Chairman of the New York Clothing Manufacturers' Exchange and the Rochester Clothing Market, that he acted as secretary of the Board of Arbitration in the Cloak and Suit Industry, and that "the Chairman of the Board was the Hon. Louis D. Brandeis, now Associate Justice of the Supreme Court of the United States" and that he had served in similar capacities in various industries; his explanation of the clothing industry before and since the organization of the Amalgamated Clothing Workers of America, his opinion of the benefit and advantage of collective bargaining, his description of the adjustment of labor disputes through mediation, and his "conclusions" concerning the effect of collective bargaining agreements upon industry, including "excerpts from a typical decision rendered by me" in a labor controversy; an analysis of decisions rendered by him in 1927 and 1928, in the hearings which he held involving clothing contractors and manufacturers and others.

The testimony of William M. Leiserson (R. 282-290), Professor of Economics and Chairman of the National Mediation Board, that he has acted as Impartial Chairman of various labor boards established by collective bargaining agreements in the clothing industry, and

has arbitrated labor disputes; his "observations" of the effect of collective bargaining in the clothing industry; his comments upon the opinions of the Supreme Court; his statement of the purpose of Congress in adopting the National Labor Relations Act, and his opinion that "the most effective way of avoiding strikes and other interruptions to industry on account of labor disputes is to equalize bargaining power between employers and employes . . ."

The testimony of Harry A. Millis (R. 291-296), Professor of Economics and former member of National Labor Relations Board, that he has been a student of labor problems and is familiar with the men's clothing industry; his conclusions as to unequal wages, irreglar hours and working conditions, and their effect on industry; his opinions as to the value of unions and collective bargaining and the benefits to be derived from them.

The testimony of Dr. Benjamin M. Squires (R. 297-307) that he is a lecturer on economics and "has held other positions qualifying him to testify in the field of industrial relations", having acted as arbitrator in labor disputes in the clothing and other industries, and having been special advisor to the National Labor Relations Board; his experience with the Amalgamated Clothing Workers of America and the appreciative attitude of the Government with respect to this Union and its "spirit of cooperation"; his observations of the organization of workers in men's clothing industry and his opinion of the results, including his summary of the testimony of various persons before Government Commissions, culminating in a panegyric on the Union.

The testimony of Boris Maruchess (R. 308-315), labor manager for the New York Clothing Manufacturers'

Exchange and formerly statistician for the Bureau of Labor, that he has assisted in compiling reports on labor and industrial problems in the needle trades and has had experience in the clothing industry, is familiar with clothing strikes and the losses entailed thereby; the organization of the New York Clothing Manufacturers' Exchange, who composed it and the reasons for it; his request that he be forgiven for displaying pride in his accomplishments as labor manager of the Exchange; the cooperative spirit of the Amalgamated Clothing Workers Union in its dealings with his Exchange; his opinion as to the value of collective bargaining agreements and a copy of the agreement between the New York Clothing Manufacturers' Exchange and the Amalgamated Clothing Workers of America.

The testimony of Charles D. Jaffee (R. 316-320), President of the Jaffee-Cohen & Lang Clothing Company, that he has been President of the New York Clothing Manufacturers' Exchange for eleven years; that it engages in collective bargaining and its beneficial results; that its agreement with the Amalgamated Clothing Workers of America "has been aptly described as 'a document in New York clothing history comparable in significance to the Constitution in American history' "; the copy of the menu and program issued on the Tenth Anniversary celebration of the Exchange, containing a picture of and an artcile by the witness in which he "with pardonable pride" congratulates himself upon the "leadership" of his Exchange and upon the Amalgamated Clothing Workers; and another panegyric upon Sidney Hillman, President of the Amalgamated Clothing Workers of America.

The testimony of Max L. Holtz (R. 321-322), President of a company of clothing manufacturers in

Rochester, as to his experience with and opinion of strikes and collective bargaining.

The testimony of Morris Greenberg (R. 323-326), an expert on the technical and practical manufacturing of clothing, and industrial relations in that and related industries; that he was Executive Director of the Men's Clothing Code Authority of the NRA; the processes of manufacturing men's clothing in the United States.

In all this mass of testimony covering approximately four hundred printed pages, there is not one word of proof that the alleged unfair labor practices in this case in any way affected the production of clothing by or the business of the Friedman-Harry Marks Clothing Company, much less interstate commerce, or that they even tended to do so. Yet, this is the testimony upon which the National Labor Relations Board found the Act to be applicable to that company!

At the conclusion of these hearings, on December 5, counsel for Respondent immediately waived all argument and the filing of briefs and entreated the Trial Examiner and the National Labor Relations Board to decide these cases as expeditiously as possible, so that—the facts not having been denied—the legal questions involved might be promptly adjudicated and both the employer and employes be advised of their status. Despite this and despite subsequent repeated requests to the Board, no decision in these cases was forthcoming until March 28, 1936, almost four months later.

It is highly significant, in considering the question of whether or not these alleged unfair labor practices were tending to burden or obstruct interstate commerce, that it took this Board from October, 1935, the time of filing of

the charges, until March 28, 1936, to determine and adjudicate an admitted question of fact and a simple question of law, although everything possible had been done by this Respondent to shorten and expedite the hearings and the Board's labors.

This lapse of time becomes important, however, when it is remembered that this Board, on March 28, finally ordered Respondent to then reinstate the laid-off workers with back pay from the respective dates on which they were laid off to March 28.

The decision, itself, finally arrived at by this Board, constitutes an astonishing exhibition by a quasi-judicial Board, set up to fairly and impartially determine questions of fact and of law. Not only did this Board fail to strike out one iota of the mass of immaterial and irrelevant statements admitted by its Trial Examiner, but it in turn, bottomed its findings and decision entirely upon it.

The Findings of the Board on which it bases its jurisdiction over this controversy and determines this Act to be applicable to this company, are spread over ten pages of its opinion (R. 379-389). These conclusions as to general economic and sociological problems, the size of the men's clothing industry, its importance and the general methods of manufacturing men's clothing and selling it at wholesale and at retail, constitute exactly the same considerations urged upon this Court to support the constitutionality of the NIRA, and summarily rejected by it, in the *Schechter case*, and urged with respect to the coal industry under the Guffey Act and just as summarily rejected in the *Carter case*.

First, the National Labor Relations Board decided (R. 379-389) that the men's clothing industry is one of the

large industries of the country, that the raw materials used in the manufacture of the clothing come from various parts of the country, that various methods of manufacture are employed, that the product is distributed for resale in all parts of the country, that it reaches the consumer by various methods of retailing, that the various manufacturers use national advertising to encourage their sales and that, because of the variation in costs due to geographical locations, manufacturing operations have been moved, from time to time, from one State to another.

Practically none of these Findings of the Board is applicable to the Respondent, and certainly none of them is relevant to the questions here involved. For instance, the Board relied upon testimony to the effect that manufacturers other than this Respondent contract their merchandise out to be fabricated in other plants, that some manufacturers buy parts of garments which have already been made, that some retailers employ men to make alterations on the garments for the consumers, that some manufacturers own and operate retail stores, that others sell by house to house canvassing, that some manufacturers advertise nationally and that others have moved their plants from one State to another at various times. *Not a single one of these "Findings" is true of or applicable to this Respondent.* Yet, it is upon them that the Board determined that Respondent is "engaged in the course and current of interstate commerce" (R. 382-389).

Next the Board decided (R. 389-396) that unfair competitive advantages exist in the clothing industry, due to differences in wage scales and working conditions in various factories and localities; that collective bargaining is advantageous in the clothing industry, that the Amalgamated Clothing Workers of America is a highly praiseworthy

organization, that it has been attempting to unionize the entire clothing industry and to act as the representative of all the workers in the industry in bargaining with their employers as to their wages, hours and conditions of employment.

The findings with respect to Respondent's business (R. 396-399) are that the Company purchases its raw materials in various States in the country, that it manufactures its product in Richmond, Virginia, and sells it to retailers located in other States, that the company advertises its name and location in one national men's wear directory; that its business is substantial, and increased in the year 1935 due largely to the fact that it had secured $50,000 additional capital.

As to the alleged unfair labor practices (R. 399), the Board refused to strike out and adopted in whole the testimony of all the witnesses, although it consisted in large part of rank hearsay, immaterialities and matters which had occurred prior to the adoption of the Act.

From all of the above, the Board reached the astounding conclusion (R. 408, par. 42-43) that "the aforesaid acts of Respondent occurred in the course and conduct of commerce among the several States and immediately affect employes engaged in the course and current of such commerce," and that they "have burdened and obstructed the course and conduct of commerce among the several States and lead and tend to lead to labor disputes burdening or obstructing such commerce and the free flow thereof."

Upon these "findings of fact" and "conclusions of law," the Board passed an Order which, among other things, requires Respondent to reinstate the employes, with back pay

from the date of discharge, and to post notices in conspicuous places in its plant for a period of thirty days, notifying its employes that it will cease and desist from carrying on any of the unfair labor practices charged against it.

Neither justice nor the necessities of this case required the posting of such a notice. After the balance of the Order was complied with and the employes were reinstated in their jobs with back pay, and the employer complied with the Order to cease and desist, the status would have been restored and the employer brought into complete compliance with the Act. The additional requirement that he post such notices is nothing more nor less than vindictive punishment which could serve no other purpose than to impress every employe with the fact that the employer was being compelled to make a public apology, that Union employes stood in a favored position and that the Government would interfere in their behalf upon complaint of "discrimination". The notices amount to an invitation to disgruntled employes to indulge in fault-finding, the fomenting of strikes and exaction of demands with the assurance that the Government will hear and determine the charges, reasonable or unreasonable.

And, it is an inducement to all employes to join the Union and secure permanent employment without fear of discharge. The very requirement that disgruntled employes must be reemployed and retained in service grants to them a greater right than any other law in this country affords to any man. No executive of a business, no technical expert, nor any other person having even a long term written contract with his employer, can secure such a judgment from the Courts. The most that he can secure upon a breach by his employer of the contract, is the monetary damage that he can prove he has sustained. He cannot secure reinstate-

ment. By virtue of the judgment of this Board, however, union members found by the Board to have been "discriminated against" not only receive full monetary "damages" for their losses, but reinstatement in their positions as well. What kind of loyalty, discipline and efficiency can be expected of employes so forced upon their employers? If the very next day after their reinstatement, it becomes necessary to correct or discipline them, is it not inevitable that they will believe and charge that the action is the result of the previous controversy?

The requirement of reinstatement leaves out of consideration entirely the questions of whether at the time of reinstatement a seasonal slack has intervened, or there is a lack of orders for the employers' product, or there is a business depression, or there has been a change in methods of manufacturing. These, or any one of a number of other things may make it inadvisable, if not impossible, for the employer to maintain as large a force of employes as he formerly had. Suppose wage scales have dropped! Suppose the particular operation on which the employes were engaged has been completed! Suppose in the case of a clothing manufacturer he no longer requires pressers by hand because he has installed electrical pressing machines, or that he no longer requires a force of ten cutters because he has introduced electrical cutting knives! Suppose he has found other employes in his plant more efficient and more capable of performing the work or operations previously performed by the reinstated employes! Suppose the clothing manufacturer has found that it is more efficient to employ male operators instead of female operators, or vice versa!

Are all of these conditions to be ignored and the employer still be compelled to reinstate the employes in

their old positions with the same salary? And for how long? Is the employer thus forever married by a "shot-gun" ceremony, for better or for worse, to all of these employes?

But the most arbitrary, unnecessary, unfair, and unreasonable incident in this chronology of administrative events in this case occurred when this Board finally rendered its decisions. After having been requested by the Respondent numerous times over a period of months to decide these cases, and after having held these matters, in which no defenses had been interposed, under advisement for four months, the Board suddenly, on Saturday, March 28, 1936, handed down its decisions, and simultaneously gave out printed copies of them, which had been prepared by its publicity department, to the Press, and at the same moment forwarded petitions for enforcement of its Orders to the United States Circuit Court of Appeals for the Second Circuit, in New York City.

The first notice that Respondent had of these decisions was when it appeared in the newspapers as a result of the Board's press release. The notification to the Respondent was sent by mail to its office and plant in Richmond, and when this notice was received by Respondent on March 30, the Board's petitions for enforcement had already been filed in the Circuit Court of Appeals in New York.

Certainly this Act contemplates that the decision of the Board shall be served upon Respondent at least before any application is made to a Circuit Court of Appeals for its enforcement; and it is equally obvious that Respondent must have a reasonable opportunity to determine for itself and to advise the Board whether or not it will comply with the Board's Order, before a petition may be filed to require compliance with the Order. At a preliminary hearing in

this matter, the Circuit Court of Appeals for the Second Circuit so held.

But this was not all! Although the employe complainants in this case all lived in the City of Richmond, Virginia, although Respondent's factory and offices are in Richmond, Virginia, although all the alleged unfair labor practices took place in Richmond, Virginia, although the Board served all of its notices, including its decision, on the Respondent at its plant and office in Richmond, Virginia, and held all of its hearings there, nevertheless the Board arbitrarily, and over the protest of this Respondent, filed its petitions for the enforcement in the Circuit Court of Appeals for the Second Circuit in New York City and dragged this Respondent there for hearing merely on the technical ground that Respondent maintained a showroom and sales office in New York. And this despite the fact that the United States Circuit Court of Appeals for the Fourth Circuit is located in Richmond, Virginia, the situs of all the parties, the controversy and of all other action by the Board.

This could have been done for no other reason than either to secure what was hoped to be a more favorable forum or to harass, embarrass and cause added expense and difficulty to this Respondent. If the procedure under this Act is in the nature of equitable relief, then it is axiomatic that "he who seeks equity must do equity". To say the very least, this action was taken in flagrant disregard of the convenience, expense and rights of everybody concerned, and for no justifiable reason.

This outline of the methods and the manner of administration of this Act give significant proof, it is respectfully submitted, of its discriminatory and persecutory nature and the abuses which inevitably flow from it.

Regardless of what might be the real purpose and character of this Act, its attempted enforcement against Respondent is beyond the powers granted to Congress by the Commerce Clause of the Constitution, and the Act violates the Due Process Clause of the Fifth Amendment because it is arbitrary, unreasonable and capricious and bears no real and substantial relation to the regulation of interstate commerce.

II.

THE COMMERCE CLAUSE.

(THE NATIONAL LABOR RELATIONS ACT IS NOT APPLICABLE TO THE PURELY LOCAL MANUFACTURING BUSINESS OF RESPONDENT; AND, THEREFORE, THE PROCEEDINGS OF THE NATIONAL LABOR RELATIONS BOARD IN THIS CASE ARE WITHOUT JUSTIFICATION UNDER THE CONSTITUTION.)

(a) Manufacturing is a purely local activity which may not be regulated under the Commerce Clause.

It seems to us a work of supererogation, in addressing this Court, to trace the history of and review the decisions dealing with the meaning of the Commerce Clause. Nor will we burden the Court with our comment upon the many and varied social and economic theories which have been advanced from time to time in attempts to distort and extend its scope.

Suffice it to say that in no decision of the Supreme Court can there be found any authority or warrant for the attempted enlargement of the powers of the Federal Government, to include the regulation of the dealings between an employer, engaged in the purely local business of manufacturing, and his employes.

Such dealings and relations are merely incidents of production. They are not interstate commerce, and they do not directly "affect" interstate commerce. This has been held to be the law so often by the Supreme Court that it has become axiomatic.[1]

The theory of the Government in this case is that labor relations and conditions arising and occurring in production of men's clothing are subject to regulation because the raw materials used therein come from States other than the State in which the manufacturing operations are carried on, and because the finished product ultimately finds its way to retailers and consumers in States other than that in which the garments are made. It contends that, because of these facts, experience shows that any labor dispute arising or occurring in the course of that production may lead to industrial strife and strikes which may "affect" interstate commerce.

This theory was plainly rejected in unmistakable language in both the *Schechter* and *Carter* cases.

In the *Schechter* case, the Court held that the relations of a poultry dealer in New York (who imported chickens into

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[1] *Gibbons* v. *Ogden*, 9 Wheat. 1; *Veazie* v. *Moor*, 14 How. 568, 573-574; *Kidd* v. *Pearson*, 128 U. S. 1, 20-22; *Coe* v. *Errol*, 116 U. S. 517, 526; *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, 12; *Del., L. & R. R. Co.* v. *Yurkonis*, 238 U. S. 439; *Hammer* v. *Dagenhart*, 247 U. S. 251, 272; *Crescent Cotton Oil Co.* v. *Miss.*, 257 U. S. 129; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 407-408; *Heisler* v. *Thos. Colliery*, 260 U. S. 245, 259-260; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178; *United Leather Workers* v. *Herkert*, 265 U. S. 457, 467, 471; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 182; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 235; *Chassaniol* v. *Greenwood*, 291 U. S. 584, 587; *Schechter et al.* v. *U. S.*, 295 U. S. 495; *U. S.* v. *Butler et al.*, 297 U. S. 1; *Carter* v. *Carter Coal Co. et al.*, 298 U. S. 238.

the State of New York from other States for killing and sale), and his employes, did not directly affect interstate commerce. In the *Carter* case, the Government's contention that it had the right to regulate labor relationships in the mining industry (because coal is an important national commodity and, after it is mined, is shipped into various States throughout the country), was as definitely rejected. In the *Schechter* case, the labor relations sought to be regulated existed after the transportation in interstate commerce, in the *Carter* case before.

There is a slight factual difference between the *Schechter* and *Carter* cases and the case at bar. In the *Schechter* case the articles were imported from other States before the conversion, over which the Federal Government sought to impose labor regulations, took place. In the *Carter* case the process of conversion, in which the Government sought to regulate labor conditions, took place before the coal was exported to other States. In the present case, raw materials are imported into the State of Virginia before the manufacturing operations, in which the Government seeks to regulate the labor relations, take place, and the finished product thereafter finds its way into other States. Does this factual difference bear any legal significance?

The attitude of the Courts on this subject is best expressed by the language of Mr. Justice SUTHERLAND in the *Carter* case (p. 310), in reaffirming the decision in the *Schechter* case:

> "A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the Federal Government is the same whether the wages, hours of service, and working conditions, *and the bargaining about them,* are related to production before interstate commerce has begun or the sale and distribution after it has ended." (Italics ours).

And, as if to anticipate the very facts and legal questions presented in this case, the Court also said (p. 309):

> "The Government's contentions in defense of the labor provisions are really disposed of adversely by our decision in the *Schechter* case, supra. The only perceptible difference between that case and this is that in the *Schechter* case, the Federal power was asserted with respect to commodities which had come to rest after their interstate transportation; while here, the case deals with the commodities at rest before interstate commerce has begun. That difference is without significance. The Federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. No such distinction can be found in anything said in the *Schechter* case."

In the *Schechter* case, after disposing of the Government's contention that a national crisis and economic depression would support the extension of federal powers, the Court turned to a consideration of whether the provisions of the Live Poultry Code, established under the National Industrial Recovery Act, relating to the hours and wages of employes of poultry slaughter houses in the State of New York, and sales of poultry there made to retail dealers and butchers, were within the regulatory power of Congress under the Commerce Clause.

The Court first held that such transactions were not in interstate commerce and then said at p. 542:

> "Were these transactions 'in' interstate commerce?
>
> "Much is made of the fact that almost all the poultry coming to New York is sent there from other States.

> But the Code provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to Defendants. • • • Defendants held the poultry at their slaughter house markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by Defendants were transactions in interstate commerce."

The Government's contention that the business attempted to be regulated in that case "affected" interstate commerce was next rejected by the Court in the following language (p. 546):

> "In determining how far the Federal Government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects • • •. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the Federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to Federal control."

The rule that manufacturing is a local activity and does not directly affect interstate commerce, was reaffirmed by the Court in the following language (p. 547), which the Court quoted from its decisions in the cases of *Industrial Asso.* v. *U. S.*, 268 U. S. 64, 82, and *Levering and Garrigues Co.* v. *Morrin*, 289 U. S. 103, 107-108:

"The alleged conspiracy and the acts here complained of spent their intended and direct force upon a local situation—*for building is essentially local as mining, manufacturing or growing crops,*—and if by resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." (Italics ours.)

To the same effect, in his concurring opinion in the *Schechter* case, Mr. Justice CARDOZO said (p. 554):

"I find no authority • • • for the regulation of wages and hours of labor in the intrastate transactions that make up the defendant's business. As to this feature of the case, little can be added to the opinion of the Court. • • • *Activities local in their immediacy do not become interstate and national because of distant repercussions.*" (Italics ours.)

If there was any doubt, after the *Schechter* decision, that Congress has no power to regulate labor conditions in transactions intrastate in character, such as manufacturing, that doubt has now certainly been entirely dispelled by the opinion of the Supreme Court in the *Carter* case. The Government's contention in that case was based upon the same theory which it had advanced in the *Schechter* case, that the business of coal mining "affects" interstate commerce because coal is shipped outside the State in which it is mined.

In again overruling this argument, the Court, in the *Carter* case, definitely delineated the powers of the States and the powers of the Federal Government to regulate com-

merce, within their respective spheres, in these words (pp. 303-304):

> "One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commerce, whether such sale and shipment were originally intended or not, has engaged in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another State, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the State; in respect of the latter, to regulation only by the Federal Government. *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol* v. *Greenwood*, 291 U. S. 584, 587.
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> • • • •
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> "A consideration of the foregoing, and of many cases which might be added to those already cited, *renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, collective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce;* and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitute a transaction in or forms any part of interstate commerce. *Schechter Corp.* v. *U. S., supra, p.* 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, *the local character* of mining, *of manufacturing* and of crop growing, *is a fact, and remains a fact, whatever may be done with the products.*" (Italics ours.)

Despite all these express and continued statements in both the *Schechter* and *Carter* cases, holding a similar system of collective bargaining and a Labor Board with similar powers, to be invalid, the Government now contends that "neither *Schechter Corp.* v. *United States*, 295 U. S. 495, nor *Carter* v. *Carter Coal Co.*, 298 U. S. 238, (are) here applicable". (See Brief for National Labor Relations Board in Case No. 419, p. 17).

We submit that the above language of the Court in the *Carter* case is extremely pertinent, and might well have been written for this case. It fits the situation exactly. Herein, attempt is made to regulate the labor relations, during the course of production, of the Friedman-Harry Marks Clothing Company with its employes engaged in that production. In its ruling upon the *Carter* case, the Supreme Court decided the issues in this case.

(b) The dealings and transactions between the Respondent and its employes, with respect to and in the course of manufacture of its product, bear no relationship to interstate commerce.

As a basis for its jurisdiction in this case, the Board found (R. 408):

> "The aforesaid acts of Respondent occurred in the course and conduct of commerce among the several States and immediately affect employes engaged in the course and current of such commerce. The aforesaid acts of Respondent have burdened and obstructed the course and conduct of commerce among the several States and lead and tend to lead to labor disputes burdening or obstructing such commerce and the free flow thereof."

In order to reach such a conclusion and in order to attempt to relate the production of men's clothing, as carried on by this Respondent, and its dealings with its employes with respect to and in the course of that manufacture, to interstate commerce, the Board is compelled to indulge in the following sophistry:

(1) that men's clothing is an important commodity;

(2) that the raw materials necessary for the production of men's clothing come from various States of the Union and from foreign countries to the point of manufacture;

(3) that men's clothing is produced in only some of the States, while it is shipped to and used in all of them;

(4) that employes in this industry are not on an equal level with their employers with respect to bargaining powers;

(5) that to secure an equal footing for them it is necessary that employes be permitted to organize and exercise their bargaining powers through organizations;

(6) that labor organizations must be permitted complete freedom, without limitation or restrictions, to attempt to unionize industries and businesses, because, they offer the best medium for representation of employes;

(7) that strikes, industrial strife and unrest are the inevitable result of the failure of employers to recognize the rights of their employes to organize and bargain collectively;

(8) that when these conditions exist the movement of commerce among the various States may be affected and impaired;

(9) that if the flow of interstate commerce is interfered with, a decrease in purchasing power may result and may lead to economic depression; and

(10) that therefore and thereby interstate commerce is *directly* affected.

Not only is this sophistry factually specious and fallacious, and beyond the realm of any valid legal concept, but it is especially ridiculous in the light of the particular facts in this case.

When it is sought to apply that sophistry to this case, the Government is constrained to make even these additional assumptions:

(11) that the discharge of nineteen employes and the hostility of the employer toward the union might cause other employes to become suspicious of and dissatisfied with their employer;

(12) that unrest might be caused thereby in the plant;

(13) that other employes might join the union;

(14) that more discharges of employes who have joined the union might follow;

(15) that as a result of such discharges, a strike might result;

(16) that Respondent might not be able to obtain new workers to replace those on strike;

(17) that Respondent might not have sufficient finished product on hand to supply the demands of his customers during the period of the strike;

(18) that Respondent might be unable to produce the amount of merchandise necessary to meet the demands of his customers;

(19) that if the Respondent is unable to supply the demands of his customers, the amount of his goods moving into and through interstate commerce may decrease;

(20) that such a decrease might be of sufficient size and importance to "affect the free flow of commerce" in men's clothing; and

(21) that such an effect upon interstate commerce would be a "direct" one.

The Record in this case directly belies such hypothesis. Here, Respondent discharged nineteen of its eight hundred employes. There is no evidence in this case that the garments upon which these nineteen employes were working were destined for or shipped to customers outside, rather than within, the State of Virginia. There was and has been no disorder, no strife, no interference with the orderly conduct of the business of Respondent, and no strike resulting from the discharge of these workers. The action of Respondent, undefended in this case, has not burdened, obstructed, or affected the flow of interstate commerce, nor has it tended to burden, obstruct or affect the flow of interstate commerce. It has not even affected in any way the flow of production in Respondent's own factory, much less the flow of interstate commerce or the flow of men's clothing into interstate commerce.

And the legal fallacy is as great as the factual fallacy in this case.

The unanimity of the Supreme Court on this point is demonstrated by the following statement of Mr. Justice Cardozo, in his concurring opinion in the *Schechter* case, supra, page 554:

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the centre. A society such as ours 'is an elastic medium which transmits all tremors through its territory; the only question is of their size.' Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. * * *"

(c) The Anti-Trust and Current-of-Commerce Cases:

But the Government contends it has the right to utterly disregard the facts of this case and the patent actuality that the alleged unfair labor practices in no wise burdened or obstructed interstate or even intrastate commerce. It argues that the men's clothing industry is an important national industry; that the industry will be able to function better and with less strife if unions are encouraged; that labor disputes between employers and employes have in the past caused and will continue to cause strikes and labor unrest; and that such recurrent controversies and evils affect production, consumption and the flow of the article in interstate commerce, and, therefore the Federal Government may prevent as well as remedy such evils.

Exactly the same contention was made by the Government at great length in the *Carter* case. It was summarily disposed of by the Court in the following language (pp. 308-309):

"It is quite true that rules of law are sometimes qualified by considerations of degree, as the Government argues. But the matter of degree has no bearing upon the question here, since that question is not—

What is the *extent* of the local activity or condition, or the *extent* of the effect produced upon interstate commerce? but—What is the relation between the activity or condition and the effect?

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

The language above quoted is so significant and so decisive of the very argument made by the Government in this case, (its Brief in case No. 419, at pp. 14 and 15 et seq.; 71 et seq.) and is grounded upon so many previous decisions of the Court to the same effect, that it requires neither comment nor expansion here.

The Anti-Trust Cases.

In the *Carter* and *Schechter* cases, as in this case, the Government advanced the contention that the decisions in the line of cases involving conspiracy to restrain interstate commerce in violation of the anti-trust laws, were applicable. The Court considered this argument in both of those cases, and completely rejected it on the ground that in the anti-trust cases the acts which were enjoined were in themselves unlawful, interstate commerce was the direct object of attack, and the restraint of such commerce was the immediate end in view and the necessary consequence of the acts. The Court, in holding them to be inapplicable, pointed out that the law involved in those cases was concerned "not with the character of the acts or of the means employed, which might be in and of themselves purely local, but with the intent and direct operation of those acts and means upon interstate commerce."

And it must be remembered, too, that the anti-trust cases involve the prevention of activities in themselves unlawful, while in this case the National Labor Relations Act attempts to make unlawful acts in themselves entirely lawful.

The Current-of-Commerce Cases.

The last resort of the Government in this case is the contention that because the raw materials, which are used in production, come from States other than that in which their conversion and manufacture take place, and because the finished product is destined for and ultimately finds its way to retailers and consumers beyond the borders of the State in which it is manufactured, the process of manufacture is in the "flow" or "stream" or "current" of commerce.

In support of that contention, the Government urges that the line of cases known as the "current-of-commerce" cases,

is applicable here. It cites such cases as *Stafford* v. *Wallace*, 258 U. S. 495, and *Swift & Co.* v. *United States*, 196 U. S. 375, which involved the constitutionality of such statutes as those regulating traders in the commodities handled at stock-yards and in grain elevators, through which cattle and grain merely passed, resting only temporarily during the course of their transportation from State to State.

The Government closes its eyes to the wide and vital difference which exists between an instrumentality such as a stock-yard or a grain elevator for the temporary handling of an article or commodity in the course of its transit, and the process of conversion and fabrication of many raw materials into an entirely different article or commodity.

It is likewise important to remember that there Congress was dealing with matters "affected with a public interest", that it was preventing acts "designed" to affect commerce in the articles in question, and that the activities regulated in those cases were exercised by one group of persons in connection with businesses carried on by another group, rather than the regulation of the internal conduct of a single business.

The attempt was made to draw an analogy between the "current-of-commerce" cases and the *Carter* and *Schechter* cases. The language of the Court in the *Carter* case (pp. 305-306) disposed of that contention:

> "Another group of cases, of which *Swift & Co.* v. *United States*, 196 U. S. 375, is an example, rest upon the circumstance that the acts in question constituted direct interference with the 'flow' of commerce among the States. In the *Swift* case live stock was consigned and delivered to stock yards—not as a place of final destination, but as the Court said in *Stafford* v. *Wallace*,

258 U. S. 495, 516, 'a throat through which the current flows'. The sales which ensued merely changed the private interest in the subject of the current without interfering with its continuity. *Industrial Asso.* v. *United States*, 268 U. S. 64, 79. It was nowhere suggested in these cases that the interstate commerce power extended to the growth or production of the things which, after production, entered the flow. If the Court had held that the raising of the cattle, which were involved in the *Swift* case, *including the wages paid to and working conditions of the herders, and others employed in the business*, could be regulated by Congress, that decision, and decisions holding similarly, would be in point; for it is that situation, and not the one with which the Court actually dealt, which here concerns us. * * * (Italics ours.)

"The restricted field covered by the *Swift* and kindred cases is illustrated by the *Schechter* case, supra, p. 543. There the commodity in question, although shipped from another State, had come to rest in the State of its destination, and, as the Court pointed out, was no longer in a current or flow of interstate commerce. The *Swift* doctrine was rejected as inapposite. In the *Schechter* case the flow had ceased. Here it had not begun. The difference is not one of substance. The applicable principle is the same."

The language above quoted is conclusive when applied to this case. If it be argued that it is not applicable because the facts in the *Schechter* case and in the *Carter* case were not exactly the same as those in the case at bar, the answer is supplied by the case of *Arkadelphia Milling Co.* v. *St. Louis S. W. Rwy. Co.*, 249 U. S. 134, in which the facts were that there was transportation both prior and subsequent to the manufacturing operations. In demonstrating that federal regulation may not, and the flow of commerce does

not, begin until after manufacturing has ceased and the article is placed in interstate commerce, even though raw materials are transported to the place of manufacture, the Supreme Court said, in the *Carter* case (p. 306):

> "The distinction suggested is illustrated by the decision in *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U. S. 134, 150-152. That case dealt with orders of a state commission fixing railroad rates. One of the questions considered was whether certain shipments of rough material from the forest to mills in the same state for manufacture, followed by the forwarding of the finished product to points outside the State, was a continuous movement in interstate commerce. It appeared that when the rough material reached the mills it was manufactured into various articles which were stacked or placed in kilns to dry, the processes occupying several months. Markets for the manufactured articles were almost entirely in other states or in foreign countries. About 95% of the finished articles was made for outbound shipment. When the rough material was shipped to the mills, it was expected by the mills that this percentage of the finished articles would be so sold and shipped outside the State. And all of them knew and intended that this 95% of the finished product would be so sold and shipped. This court held that the state order did not interfere with interstate commerce, and that the *Swift* case was not in point; as it is not in point here."

And if it then be argued that in the *Arkadelphia* case the raw materials were shipped from *within* the State to the mill, while in this case raw materials come from *without* the State to the factory, this is a distinction without difference. The Courts have always held that, for the purpose of establishing railroad rates, as long as commodities, whose character is not changed, are in a continuous flow of interstate

commerce, the federal rate-making power attaches from the point of original shipment, whether the commodity moves in intrastate or interstate transportation to the point of temporary stoppage. *Carson Pet. Co.* v. *Vial*, 279 U. S. 95; *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111.

The Decisions of the Circuit Courts of Appeals construing this Act with respect to the Commerce Clause.

Five different Circuit Courts of Appeals of the United States have thus far passed upon cases involving the question of whether this Act was, under the Commerce Clause, applicable to various manufacturing businesses.

It is significant to note that, without a dissenting voice being raised, it was uniformly held that the power of Congress under the Commerce Clause could not be extended to the regulation of labor relations between employers and employes in manufacturing businesses.

Foster Brothers Manufacturing Company, Inc. v. *National Labor Relations Board*, (C. C. A. 4, October 6, 1936) Case No. 4074

Fruehauf Trailer Company v. *National Labor Relations Board* and *National Labor Relations Board* v. *Fruehauf Trailer Company*, 85 Fed. (2d) 391 (C. C. A. 6, June 30, 1936)

Pratt v. *Stout et al.*, 85 Fed. (2d) 172 (C. C. A. 8, August 5, 1936)

National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, 83 Fed. (2d) 998 (C. C. A. 5, June 15, 1936)

National Labor Relations Board v. *Friedman-Harry Marks Clothing Company, supra.*

III.

THE DUE PROCESS CLAUSE.

(THE ACT IS AN UNCONSTITUTIONAL INTERFERENCE WITH THE PROPERTY AND LIBERTY OF CONTRACT OF RESPONDENT AND ITS EMPLOYES.)

(a) The specific violations of the Fifth Amendment.

Whether or not the National Labor Relations Act is a valid exercise of the power of Congress to regulate interstate commerce, it is unconstitutional because it is violative of the due process clause of the Fifth Amendment to the Constitution.

The Fifth Amendment guarantees that no person shall "be deprived of life, liberty or property without due process of law". Inherent in the liberty and property guaranty is the inalienable right of every citizen to engage in any lawful business or calling, to enter into all contracts which may be necessary and proper, to sell his labor or purchase that of another upon such terms as he desires.

Necessarily included among these are the right of an employer to hire and discharge whomever he pleases, whenever he pleases and for whatever reason; the right of an employer and his employe to arrive at an agreement between themselves in any manner and upon any basis they see fit respecting hours, wages and other conditions of employment; and, the right of an employe to be secure in his position, subject only to being discharged at the will of his employer.

This Act definitely and distinctly violates the Fifth Amendment in four particulars.

First, Sub-sections 3 and 4, of Section 8, provide that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization", or "to discharge or otherwise discriminate against an employe because he has filed charges or given testimony under this Act." These sections attempt to regulate the conditions under which an employer may engage his workers and under which he may discharge them.

This is tantamount to depriving the employer of all discretion in the matter of engaging, advancing, demoting, disciplining, furloughing and discharging his employes. It actually substitutes management by this Board for that of the owner of the business. How can this Board determine the capabilities and efficiency of employes and the innumerable and delicate questions of particular employments and daily routine?

Even from the standpoint of the employe, these sections are an arbitrary and unreasonable interference with his rights. Moreover, these sections place union employes in a preferred and favored status over non-union workers as to tenure of employment and advancement therein.

The same provisions appearing in Section 7A of the NIRA were specifically examined and held to be obnoxious in the case of *Rosenthal-Ettlinger* v. *Schlossberg*, 226 N. Y. Supp. 762, where the Court said:

> "If that (Section 7a) means that an employer may not discharge an employe for any reason, or for no reason, and in the case of any man discharged, must be prepared to show good cause for the discharge, other than the union affiliations of the man discharged, all em-

ployees who are union members have been transferred to a status equivalent to that of the civil service, a result which could not have been intended. Whatever the rule of the unions may be, that is not the law of the land."

Second, Section 9(a) provides that representatives elected by the *majority* of the employes shall be the *exclusive* representatives of *all* the employes for collective bargaining purposes. This section, by its terms, prohibits an employer from dealing individually with his employes, and from dealing with minority groups of his employes, in respect to rates of pay, wages, hours or other conditions of employment. By the same token, it makes agreements between the majority group and the employer, as to all conditions of employment, binding upon all individual workers and upon all minority groups, thereby depriving each of them of his right to make his own terms with his employer.

The legal philosophy of this section was definitely repudiated in the *Carter* case, supra (p. 311):

> "The power (to fix hours and wages) conferred upon the majority (of producers and of miners) is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business • • •.
>
> And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do

more than refer to decisions of this court which foreclose the question. *Schechter Corp* v. *United States*, 295 U. S. at p. 537; *Eubank* v. *Richmond*, 226 U. S. 137, 143; *Washington ex rel. Seattle Trust Co.* v. *Roberge*, 278 U. S. 116, 121-122."

Third, Sub-section 5, of Section 8, makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employes, subject to the provisions of Section 9(a)."

The term "collective bargaining" must have some meaning. Obviously, the framers of this Act intended it to carry a connotation beyond the mere requirement that an employer must meet with his employes and discuss conditions of employment with them. Its real intent and meaning are best understood in the light of the administrative interpretation of this section, which has simply been paraphrased from Section 7(a) of the National Industrial Recovery Act. The old National Labor Relations Board, set up under the terms of that Act, as well as the present National Labor Relations Board, operating under the National Labor Relations Act, have uniformly and consistently held in numerous cases that the requirement, that an employer collectively bargain with his employes, means that the employer shall continue to bargain with his employes *until an agreement actually has been reached.*

See cases cited in appendix.

With the intent of this provision thus disclosed, it will be seen that this section of the National Labor Relations Act interferes with the rights of the employer by requiring him to enter into contractual negotiations with persons with whom he may not care to contract and coercing him into agreeing to terms which may not be acceptable to him.

The worst feature of this so-called "collective bargaining" lies in the indisputable fact that it does not require bargaining by both parties to the controversy. It is utterly lacking in mutuality and does not provide an equality of bargaining position.

The employer is forced to bargain. He must recede from his original position in order to compromise with the union demands, and then he is bound to carry out his agreement. On the other hand, the union can not be required to bargain, even if the employer desires or demands it. It need not retreat from its original demands, however preposterous; and it and the employes it represents are not bound and cannot be compelled to carry out any agreement it makes.

Thus this great social scheme, which is to be the new industrial and economic panacea, is, under this Act, prostituted into the equivalent of a dangerous weapon in the hands of a dominant union with which to attack and belabor a prostrate employer, stripped of every means of defense and bound hand and foot!

Fourth, Sub-section 3, of Section 8, specifically provides that an employer may agree with the majority of his employes, through collective bargaining, to employ only union members; while, at the same time, Sections 7, 8 and 9 of the Act make it unlawful for an employer to agree to employ only non-union workers. This section invades the rights of individual workers and employers by permitting unions, through the medium of compulsory collective bargaining, to prescribe that non-union employes shall join their union as a condition precedent to obtaining or retaining their positions, at the same time making it unlawful for any individual employe or group of employes to obtain

an agreement from his or their employer not to employ union workers.

The Act requires bargaining, which is intended to mean an agreement, and makes it lawful for the agreement to provide for a closed shop. Therefore, the terms of sub-section 3, of Section 8, are tantamount to a requirement that every employer shall, upon application of a majority of his employes, agree to a "closed shop."

None of these provisions can find support in the decided cases. As a matter of fact, the rights which they invade have been repeatedly upheld and protected by the decisions of the Supreme Court.

The basic and classic statement of the principle which governs, is contained in the opinion in the case of *Allgeyer* v. *Louisiana*, 165 U. S. 578, wherein the Court (at page 589) said, with respect to the Fifth Amendment:

> "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the case of *Adair* v. *United States*, 208 U. S. 161, the Court held unconstitutional a provision of a statute passed by Congress making it unlawful for any person connected with an interstate carrier to discharge an employe of that carrier because of his membership in a labor union. The

opinion in this case extends to and embraces in its scope all of the infringements upon personal contractual rights outlined above. The Court (p. 174) said:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employe to quit the service of the employer for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employe. It was the legal right of the defendant Adair —however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.
>
> "• • • Congress could not, consistently with the Fifth Amendment, make it a crime against the United

States to discharge the employe because of his being a member of a labor organization.

"* * * If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business, *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States."

Interference with the personal rights of an employer and employe to bargain individually with respect to wages was held invalid in the case of *Adkins et al.* v. *Children's Hospital,* 261 U. S. 525. In holding unconstitutional an Act creating a Board empowered to fix minimum wages for women and children employed within the District of Columbia, the Court said (p. 545):

"That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (5th Amendment) is settled by the decisions of this Court, and is no longer open to question (citing authorities.) Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."

The decision in the *Adkins* case was reviewed by the Supreme Court within the past few months. The opinion in *Morehead* v. *People, ex rel. Tipaldo,* 298 U. S. 587, reaffirmed exactly the decision in the *Adkins* case, as well as the reasoning contained therein.

In the case of *Wolff* v. *Kansas,* 262 U. S. 522, the Court had before it the validity of the Court of Industrial Rela-

tions Act of Kansas, which Act provided that a court of three judges might hear any dispute over wages or other terms of employment in certain industries, including the clothing industry, and make findings and fix wages and other conditions of employment, which would be binding on the parties involved. In holding this State legislation invalid, the language of the Supreme Court (at page 533), is:

> "The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree. Under the construction adopted by the State Supreme Court the act gives the industrial court authority to permit the owner or employer to go out of the business, if he shows that he can only continue on the terms fixed at such heavy loss that collapse will follow; but this privilege, under the circumstances, is generally illusory. *Block* v. *Hirsh*, 256 U. S. 135, 157, 65 L. Ed. 865, 871, 16 A. L. R. 165, 41 Sup. Ct. Rep. 458. A laborer dissatisfied with his wages is permitted to quit, but he may not agree with his fellows to quit, or combine with others to induce them to quit.
>
> "These qualifications do not change the essence of the act. *It curtails the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the* 14*th Amendment. Meyer* v. *Nebraska*, decided June 4, 1923 (262 U. S. 390, 43 Sup. Ct. Rep. 625). While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom

> is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins* v. *Children's Hospital*, decided April 9, 1923 (261 U. S. 525, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394)." (Italics ours.)

In a second appeal in the same case, involving the same statute, 267 U. S. 552 (1925), the Court said:

> "The system of compulsory arbitration which the Act establishes is intended to compel and if sustained will compel, the owner and employes to continue the business on terms which are not of their making."

These cases do not stand by themselves, but form only a part of a long list of recent decisions in Federal and State jurisdictions reaffirming the principle that the contractual rights of employer and employe may in no wise be interfered with by either Congress or the State Legislatures under the 5th and 14th Amendments.[1]

The Government urges that the case of *Texas and New Orleans Ry. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, dissents from the otherwise uniform rule of law expressed in the cases heretofore cited and gives sanction to this Act.

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[1] *Lochner* v. *N. Y.*, 198 U. S. 45; *Coppage* v. *Kansas*, 263 U. S. 1; *Hitchman Coal & Coke Co.* v. *Mitchell et al.*, 245 U. S. 229; *Meyer* v. *State of Neb.*, 262 U. S. 390; *Murphy* v. *Sardell*, 269 U. S. 530; *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657; *Ribnik* v. *McBride*, 277 U. S. 350; *Near* v. *Minn.*, 283 U. S. 697, 707-708; *Montgomery* v. *Pac. Elec. Ry. Co.*, 293 Fed. 680 (C. C. A. 9th Cir.); *People* v. *Marcus*, 185 N. Y. 257; *Re Opinions of the Judges*, (Mass. S. J. C.) 171 N. E. 234; *State* v. *Daniels*, (Minn.) 136 N. W. 584; *Bemis* v. *State*, (Okla.) 152 Pac. 356; *Topeka Laundry Co.* v. *Court of Ind. Rel.*, 119 Kansas, 12; *Stevenson* v. *St. Clair*, 161 Minn. 444; *Folding Furn. Works* v. *Indust. Comm.*, 300 Fed. 991; *People* v. *Successors of Laurnaga & Co.*, 32 P. R. 766.

An examination of the decision in that case, however, discloses that it is not authority for the validity of any of the specific provisions of the National Labor Relations Act which Respondent contends violate the Fifth Amendment; nor can the opinion in that case be cited in any way as authority for the proposition that the Federal Government may place any limitation upon the right of an employer conducting a ***private business***, to hire and fire with impunity, or may require such an employer to bargain with representatives of his employes to a concluded agreement, or may subject an unwilling minority of his workers to the domination of a majority and to any contracts into which the majority may enter.

The Railway Labor Act involved therein provided for a federal mediation board to which both employers and employes might *voluntarily* go in an effort to settle their disputes, and declared the principle that employes of interstate carriers should be free to organize and join labor unions without interference or coercion from their employers. This latter was merely incidental to effectuating the purpose of creating the board, once the parties had subjected themselves to it.

The opinion in that case affirmed the *Adair* case, and it must be remembered:

> (a) That Act applied only to common carriers engaged in the transportation of commerce between the several States, whose businesses are affected with a great national public interest. Every phase of the operation of such public businesses is subject to the control and regulation of the Federal Government, and the very continuance or discontinuance of these businesses themselves are within the absolute discretion of the Government and not at the pleasure of the owners.

(This difference is of the greatest significance and importance in a consideration of the National Labor Relations Act, which is applicable to inherently intrastate enterprises affected with no public interest, the internal regulation and continuance of which is admittedly of only private concern.)

(b) The Railway Labor Act concerned itself only with employer-employe relations actually occurring in *interstate* commerce. Even these were limited by the Opinion of this Court in the *Alton* case, *infra,* which held that such regulations must bear a ***direct*** and ***reasonable*** relationship to interstate commerce.

(However, the National Labor Relations Act applies to *intrastate* businesses, and the Government contends that the Board has jurisdiction over all labor disputes regardless of whether they ***directly affect*** or ***bear a substantial relationship*** to interstate commerce.)

(c) The Railway Act did not make any attempt to govern, limit or regulate in any way the relations between employer and employe, except to protect the machinery of voluntary mediation.

(The primary violations of the "Due Process Clause" under the National Labor Relations Act lie in its elaborate, arbitrary and unreasonable restrictions and limitations upon employer-employe relations, aimed at and leveled upon the employer and non-union employe.)

(d) The Railway Act, as this Court was careful to point out and emphasize, provided only a system of voluntary mediation upon such subjects as the parties agreed to submit for consideration, and the employer was under no obligation to mediate.

(Not so the National Labor Relations Act, which sets up a compulsory system of unilateral bargaining to a conclusion, at least if possible, requiring only the employer and not the employe or the union to bargain, and a Board with plenary powers to determine whether the proposition made by the employer is fair and proper, but with no jurisdiction over the union.)

(e) The Railway Labor Act of 1926 contained no provisions for majority rule.

(The viciousness and illegality of the Act in question are demonstrated in part by its requirement that any agreement made by a majority of employes, determined according to units designated in each case by the Board, shall be binding upon all minority employes and groups. This Act also prohibits an employer from bargaining or dealing in any way with such individual employes or minority groups.)

(f) Again, the Railway Act, as stressed by the Court, did not in any way affect "the normal right of the carrier to select its employes or to discharge them".

Much is made by the Government of the fact that this Court, in the *Texas & New Orleans* case affirmed the action of the lower court in requiring the reinstatement of discharged employes.

That reinstatement was not under any express terms of the Railway Act. The facts in that contempt case not only warranted but constrained the Court, in order to protect its own position and integrity, to take such drastic action. Those facts were that the Court, after the dispute had been submitted by agreement of the parties to the Mediation Board, had issued an injunction at the request of the union,

prohibiting the company from interfering with the employes' free choice of representatives for mediation purposes.

It was in the face of this outstanding injunction that the railroad company deliberately and flagrantly attempted to form a company union and discharged employes who were active in recruiting the labor union vote!

(In reviewing the *Texas & New Orleans* case, Mr. Justice ROBERTS, in the case of *R. R. Retirement Board* v. *Alton Ry. Co.*, 295 U. S. 330, decided only recently, (at page 369) said:

> "It was pointed out that the Act did not interfere with the normal right of the carrier to select its employes or discharge them."

The National Labor Relations Act, on the other hand, expressly interferes with the employer's right to hire and discharge his employes, without reference to whether or not there is a pending labor dispute or whether the process of "collective bargaining" is being carried on.)

(b) The basic purpose of the Act is to accomplish compulsory collective bargaining, binding upon minority employes; this being invalid, the entire statute must fall.

From a reading of the National Labor Relations Act, from the Congressional Committee reports and debates upon it at the time of its consideration, and from its administration by the National Labor Relations Board, it is clear beyond contradiction that the primary and fundamental purpose, and the end to be accomplished by the Act, is the establishment of the mechanism of compulsory unilateral bargaining, binding alike upon employer, the ma-

jority employes in whose behalf negotiations are carried on (who are given the exclusive bargaining power), and the minority groups and individual employes, who are not represented. All the other features of the Act, such as those protecting the formation and maintenance of labor unions, found in Section 8, are inserted as aids to effectuating this purpose.

See: Senate Comm. Rept. No. 573, 74th Cong. 1st Sess.
Congressional Rec., May 15, 1935, Vol. 70, No. 101, 74th Cong., 1st Sess., p. 7852.

Every attempt which has been made to enact such legislation as this, has been stricken down by the courts, as violative of the due process amendments to the Constitution; and the decision of the Supreme Court in the *Carter* case is the final word as to the unconstitutionality of any scheme of enforced collective bargaining by majority rule. In that case the Court had before it the question of the constitutionality of a provision of the Guffey Act that two-thirds of the producers of coal and a majority of the miners in a district might fix minimum wages to be binding upon all producers and upon all miners in that district.

This Court held that such a provision not only constituted "legislative delegation in its most obnoxious form", but also that such provisions amounted to "intolerable and unconstitutional interference with personal liberty and private property." It is respectfully submitted that the provisions of the Guffey Act in that regard are wholly indistinguishable in principle from those in the National Labor Relations Act, and that the decision of the Supreme Court is conclusive on the similar point here involved.

If the backbone of the Act, compulsory collective bargaining, is removed, the Act cannot function and becomes of no force and validity as an inseparable whole, even if some of its subsidiary members can be independently sustained. For, while it may be possible for the Act to function despite the removal of a subsidiary feature, it is impossible for it to stand up in the absence of its backbone. It must be obvious that if the main scheme falls, it carries with it the collateral provisions which were merely designed to be in aid of that scheme.

The Government does not and cannot deny that a national system of compulsory collective bargaining is the backbone and *sine qua non* of the Act.

However, it argues that the question of severability may not be raised in this case because the specific charges contained herein do not include a direct charge that this Respondent failed to bargain collectively with its employes.

On the other hand, when it comes to argue the validity, *vel non* of the Act, and tries to justify its applicability to this Respondent under the Commerce Clause, the entire burden of its argument is that a failure to collectively bargain in the men's clothing industry causes industrial strife which may "affect" interstate commerce!

> Government's Brief in Case No. 419, particularly pp. 93, 84, 43, 42.
> See also: Senate Comm. Rept. May 1, 1935; p. 14.

Indeed, this is the only justification the Government urges for introducing into this case the mass of testimony relating to the history of collective bargaining in the clothing industry!

(c) The Act gives to the Board and the Board has assumed powers which, if valid at all, may be exercised only by Congress and the duly constituted courts of the United States.

Section 9 (a) of the Act prescribes that the representatives of a majority of the employes, "in a unit appropriate for such purposes", shall be the *exclusive* representatives of *all* the employes in such unit for the purpose of collective bargaining. Section 9 (b) of the Act gives the Board power to decide in each case whether "the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof".

These provisions constitute an unlawful delegation of power to the National Labor Relations Board. There is no legislative standard or rule prescribed for the Board to apply in determining what is a "unit". The Act grants to the Board an absolute discretion on this whole subject, which is vital to collective bargaining, as contemplated by the Act. (*See Senate Comm. Report, dated May 1, 1935; p. 14*).

The failure of Congress to set up and delineate a plan or standard for the Board, in this Act, is similar to the situation presented in the National Industrial Recovery Act. Such a delegation of power to the President, under that Act, was held to be unconstitutional and to render it void and invalid in the *Schechter* case and in the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

That this power vested in the National Labor Relations Board is both a real and an extreme one is proven by the fact that this Board is thereby placed in the position of determining whether all industry and business shall be unionized on a craft basis or by industries. Moreover, if the National Labor Relations Board determines to make the plant the "appropriate bargaining unit", it becomes apparent at

once that a craft group, composed of a bare majority of the employes in that plant, can bargain for and determine the wages and other working conditions of groups and individuals doing entirely unrelated and different types of work, whether of greater or lesser value or whether involving greater or lesser skill.

For instance, in a small clothing factory of one hundred employes, fifty-one ordinary sewing machine operators would be able to dictate the hours and wages of ten highly skilled cutters, two trained designers, eight pressing machine operators, four examiners, three bundle boys and twenty-two other employes doing all kinds of incidental work.

On the other hand if the labor Board divides this plant into craft groups and designates each craft as a bargaining unit, then the employer must deal in the above situation with at least seven or eight different collective bargaining groups, under a threat of strike from each group and with the Board supervising his bargaining with each group.

Likewise if the employer has a number of plants, it is for the Board to determine whether or not they shall comprise one unit or several units. For instance, if there are two plants performing interdependent and interrelated operations in the process of manufacture, one located in Richmond and the other in Rochester, the plant in Richmond having two hundred and fifty employes and the Rochester plant seven hundred and fifty, the Board can say that the two plants together constitute the bargaining unit, thereby permitting the seven hundred and fifty workers in Rochester, constituting the majority, to elect representatives from their own plant in Rochester to negotiate for wages and working conditions to apply not only to their own plant in

Rochester but to the Richmond plant as well, where economic conditions might be entirely different, and the employes in Richmond would be deprived of all right to bargain with respect to their own wages and working conditions.

But if the Board should determine that the two plants constituted separate and distinct bargaining units, the minority employes in the Richmond plant could demand higher wages than those prevailing in Rochester, go out on strike, throw the seven hundred and fifty workers in the Rochester plant out of work and force the employer to bargain with the minority of his employes. And the same thing is true in every individual factory or business plant having different groups performing different kinds of operations or work within its own walls.

In any event, the desires and preferences of both employer and employes, with respect to the appropriate bargaining unit are disregarded by the Act and placed within the sole autocratic power of the Labor Board, which so far has followed the recommendations and demands of the organized labor union in this regard.

Congress, itself, does not have the power to dictate the number of employes or the kind of employes according to occupation which, as a group, shall constitute a collective bargaining unit. (*Carter* v. *Carter Coal Co., supra*). How, then, can such power be exercised by a Board for which no standard has been set by which it must determine such units?

(d) The Order of the Board requiring the reinstatement of the employes, with back pay, is arbitrary and illegal.

Not only did the Board's Order require the reinstatement of the complaining employes, but it required that this Re-

spondent "make them whole for the loss of pay they suffered by payment of a sum equal to that which each would normally have earned during the period from the date of termination of employment to the date of offer of reinstatement, computed by averaging the wages earned by other employes engaged in the same operation over that period."

In this arbitrary manner the Board computes the loss by averaging the earnings of other employes, entirely ignoring the actualities of the situation, and the fact that all of these employes in this case were compensated on a piecework rather than on a time basis, and that their individual earnings depended upon the actual amount of work they performed and not upon the number of hours they worked.

For example, it may very well be, and in at least some instances it was, true that the employes discharged were the least efficient in their respective operations, so that this back pay, taken on an average of the operation, would be considerably more than the individual complainants would have earned. Moreover, the Record (pp. 352, 354, 466, 507, 522) shows that it is the custom in this industry for employes to be shifted with great frequency from operation to operation, with consequent changes in the rate of pay and amount of earnings, depending upon the type and character of the work being performed. Nor does the method make any allowance for sickness, temporary lay-offs, technological changes during the period, or any other of the innumerable factors which play an important part in determining the amount of earnings of individual employes.

So that in addition to arbitrarily requiring the employe to be returned to his work, whether he is needed or not, the Act has required the National Labor Relations Board to

act as a jury in this case and to award a money verdict in the case of each individual complainant, based not upon the facts in each particular case but upon a scheme which the Board deems to be fair.

Personal service contracts have never been subject to suits for specific performance. Neither employer nor employe has ever been able to force the other to carry out a contract calling for work and labor, in which the delicate relationship of "master and servant" was the prime consideration. This intimate and personal relationship has always impelled the courts to hold that no person could be required unwillingly to work for some one else, nor could any employer be required to retain in his service one who could not work with him and for him in harmony.

This did not leave the parties, however, without legal relief or redress. But the redress is a civil and not an equitable one. The employe has always had the right to recover from his employer any damages he may have actually sustained by breach of the contract. And the same relief is open to the employer, if he is able to prove and collect any damages.

In the enforcement of this civil remedy, it has always been the function of a jury, from the earliest days of the common law, to assess the damages, based upon the terms of the actual contract, if there was one, and if not, upon a *quantum meruit* basis, less, in each instance, the amount of money actually earned during the period involved. And, as in any other action, the complaining party is required to attempt to mitigate the damage, the employe by seeking other employment and the employer by seeking other help.

It is interesting to note in this case that although this Board rendered a monetary verdict for 19 complainants

against Respondent, covering a period of eight months at the time of its decision and eighteen months at the present time—because the Order is still running—it did not even trouble itself to first ascertain the former wages of any of these persons, nor whether they had attempted to seek work or had actually been at work earning the same or more or less money. Nor did it stop to inquire whether these former employes would return to work if reinstated and at the same wage.

Suppose these persons have removed to other localities, or suppose they are at present in other occupations, how far and how long must we look for them, and how long must we hold the jobs open for them to accept our offer of reinstatement?

This Act in this respect is totally without precedent. It marks a new legal as well as social and economic concept directly in the teeth of all of our law and jurisprudence.

The only Judge who has commented on this specific feature of the Act was Circuit Judge Wilbur (9th C. C. A.), in the case of *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, decided January 11, 1937, who said:

> "The employer • • • has lost the power to control his employe. The employes are cemented into their positions not because of fidelity to their employer, but because of fidelity to a labor organization. It was said long ago that 'a man cannot serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.' (Matt. 6: 27). • • •
>
> "An action for damages for a wrongful discharge of an employe is a form of action known to the common law, and well within the right to a trial by jury as known

at common law. Hence, the Act, so far as it authorizes the Board to assess damages without the intervention of a jury, is unconstitutional. (See discussion of corresponding provisions of the Interstate Commerce Act as first enacted in 1887, [24 Stat. 379], before its amendment in 1888, [25 Stat. 855]; *Western N. Y. & P. R. Co.* v. *Penn. Refining Co.*, 137 Fed. 343, 349. See also 12 C. J. 131, Sec. 193)."

CONCLUSION.

It is submitted that the National Labor Relations Act is unconstitutional, and that the attempt to apply it to this Respondent is invalid. The Orders of the Court below, denying the Petitions of the National Labor Relations Board, should be affirmed.

Respectfully submitted,

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APPENDIX.

Cases in which the old and present National Labor Relations Board has held that the intent of the Act is to require employers to enter into agreements with their employes as a result of collective bargaining, and has ordered employers to negotiate and enter into such agreements:

Pierson Manufacturing Company and United Garment Workers of America, Local No. 247, December 28, 1933.

Houdee Engineering Corp. and United Automobile Workers, Federal Labor Union No. 18839, decided August 30, 1934.

National Aniline & Chemical Company and Allied Chemical Workers, Local No. 18705, decided October 3, 1934.

Atlanta Hosiery Mills and American Federation of Hosiery Workers, Local No. 76, decided November 5, 1934.

Eagle Rubber Company and United Rubber Workers Federal Labor Union No. 18683, decided May 16, 1934.

National Aniline & Chemical Company and Allied Chemical Workers Local No. 18705, decided May 25, 1934.

Connecticut Coke Company and United Coke and Gas Workers Union No. 18829, decided June 30, 1934.

Eagle Rubber Company and United Rubber Workers Federal Labor Union No. 18683, decided November 8, 1934.

The Consolidated Film Company and The International Printing Pressmen and Assistants' Union of North America, decided December 5, 1934.

Colts Patent Fire Arms Manufacturing Company and Federal Labor Union No. 19393, Plastic Workers Union No.

18945 and International Association of Machinists, Local No. 354, decided February 21, 1935.

Poinsatte Auto Company, Inc. and International Association of Machinists Friendship Lodge No. 70, decided March 7, 1935.

Resnick Brothers and International Pocketbook Workers Union, decided March 15, 1935.

The Laclede Gas Light Company and Gas House Workers Union No. 18799, decided March 19, 1935.

Denver Towel Supply Company, Inc. and International Brotherhood of Electrical Workers, Local Union No. 647, decided April 8, 1935.

Southern Broadcasting Stations, Inc. and International Brotherhood of Electric Workers, Local No. 647, decided April 9, 1935.

In the Matter of Wolf Publishing Company and Cincinnati Typographical Union No. 3, decided April 11, 1935.

Nordstrom's, Inc. and Retail Clerks' International Protective Association Local No. 174, decided April 19, 1935.

Square D Company and National Brotherhood of Operative Potters Local No. 145, decided April 29, 1935.

Berger Manufacturing Corporation and Loyalty Local No. 18903, decided May 2, 1935.

Federal Mining & Smelting Company and International Union of Mine, Mill and Smelter Workers, Local No. 9, decided May 9, 1935.

In re Atlantic Refining Company and Local Nos. 310 and 318, International Association of Oil Field, Gas Well and Refinery Workers of America, decided March 19, 1936.

In the Matter of the Belmont Stamping and Enameling Company and Stamping and Enameling Workers Federal Labor Union No. 18816, decided March 20, 1936.

Re S. L. Allen Co., decided May 15, 1936.

Re M. H. Birge Co., decided May 18, 1936.

St. Joseph Stock Yards Co., decided July 9, 1936.